

FCC MAIL SECTION

Federal Communications Commission

DA 00-945

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-83
Table of Allotments,)	RM-9500
FM Broadcast Stations.)	RM-9722
(Saranac Lake and Westport, New York) ¹)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 19, 2000

Released: April 28, 2000

By the Chief, Allocations Branch:

1. At the request of Dana Puopolo ("petitioner"), the Commission has before it the Notice of Proposed Rule Making, 14 FCC Rcd 4098 (1999), proposing the allotment of Channel 276A to Saranac Lake, New York, as the community's third local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted, and Saranac Lake Radio, L.L.C. ("SLR") filed comments in opposition to the allotment. In addition, Westport Broadcasting ("WB"), licensee of Station WCLX, Westport, New York, filed comments and a counterproposal.² Reply comments were filed by Family Broadcasting, Inc. ("Family"), and SLR.

2. WB requests the substitution of Channel 275A for Channel 273A at Westport and the modification of Station WCLX's license to specify the alternate Class A channel. It states that the station is presently a limited Class A facility operating with 250 watts (0.25 kW) and an antenna height of 102 meters below average terrain. It also has a construction permit, at a new transmitter site, to allow it to operate with 650 watts at an antenna height of 90 meters above average terrain ("HAAT"), pursuant to the provisions of Section 73.215 of the Commission's Rules. WB goes on to state that it had planned to file a one-step application on Channel 275A, specifying increased facilities, and commits to filing such an application, at a new transmitter site if necessary, if its counterproposal is granted. WB submits that a comparative evaluation of the two proposals is not necessary, suggesting instead that either Channel 227A or Channel 296A be allotted to Saranac Lake. It argues that either of the substitute channels would better serve the public interest. According to WB, the allotment of Channel 276A at Saranac Lake will result in a 46.6 kilometers short-spacing to Channel 276A at Valleyfield, Quebec, Canada. Therefore, it points out that the station will be limited to 350 watts in order to avoid prohibited contour overlap with the Canadian station. However, it states that both Channel 227A and Channel 296A can be allotted to Saranac Lake with full Class A facilities which will enable a station to provide 60 dBu service to an additional 9,819 people within an additional 2,032 square kilometer area. According to WB, combining the additional service which Station WCLX can provide on Channel

¹ The community of Westport, New York, has been added to the caption.

² Public Notice of the filing of the counterproposal was given on September 14, 1999, Report No. 2361.

275A with the improved coverage from a Channel 227A or Channel 296A allotment at Saranac Lake, will result in 98,737 people within a 3,850 square kilometer area receiving additional service.

3. SLR, licensee of Stations WNBZ(AM) and WSLK(FM), Saranac Lake, opposes the allotment any FM channel to Saranac Lake without first conducting an investigation into the bona fides of petitioner's commitment to apply for the channel. SLR states that petitioner has filed at least 12 petitions for rule making to allot channels to various communities throughout the country but has failed to show his ability to apply for the channels. While SLR recognizes that the Commission normally does not require such a showing at the rule making stage, it argues that it must do so here where so many petitions are pending. SLR further argues that with the initiation of the auction process for the awarding of construction permits, it is harder to plan the process of filing and prosecuting applications. Thus, it contends that it now makes sense to file numerous petitions, as the petitioner in this proceeding has done, in an attempt to find at least some channels which will not have substantial competition. However, SLR submits that the Commission should strongly discourage such action as a waste of agency resources. It reiterates these arguments in its reply comments, stating that failure to investigate petitioner's ability to apply for these frequencies would be an "abdication of the Commission's statutory duty, under Section 307(b) of the Communications Act, to provide for a fair and equitable distribution of channels throughout the nation."

4. In response to WB's counterproposal, Family, then licensee of Station WCLX (formerly WGLY(FM)), Channel 277C3, Waterbury, Vermont, requests that Channel 248A instead of Channel 275A be allotted to Westport so as to avoid a conflict with its potential future plans to upgrade Station WLKC.³ WB filed comments consenting to the allotment of Channel 248A, stating that this channel is actually preferable since Station WCLX could increase to a 6 kilowatt Class A station without a change in transmitter site. However, it states that in the event that Channel 248A is not allotted to Westport, it will accept Channel 275A at another transmitter site.

5. As an initial matter, we do not believe that the public interest would be served by requiring the petitioner to demonstrate his financial ability to construct and operate a station at the rule making stage. It is true that the Commission no longer holds comparative hearings on mutually exclusive applications where financial issues could be raised but rather conducts auctions for newly allotted channels. However, SLR has not provided any information showing that petitioner is unable to participate in the auction for the channel, if allotted, and to construct and operate the station, if granted the construction permit or that he has failed to participate in any auction for a channel for which he had petitioned. In addition, since the allotment of a new FM channel will be the subject to an auction in which other interested parties may participate, there is no guarantee that petitioner will be the ultimate permittee. Finally, any party, including a petitioner, who states during the rule making process an intention to file a construction permit application and to operate the station, without the actual intent to do so, is subject to Commission sanctions⁴ Therefore, should a pattern develop which leads to a

³ A transfer of control from Family to Radio Broadcasting Services, Inc., was consummated on September 27, 1999. In addition, no application to upgrade Station WLKC has been filed by either Family or Radio Broadcasting Services.

⁴ In Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3914 (1990), recon. denied, 6 FCC Rcd 3380 (1991), the Commission stated that a statement of interest in operating a station made by a party who, in fact, lacks the requisite intent

concern that the Commission's processes are being abused, appropriate action could be taken at that time. See, Pleasant Dale, Nebraska, 14 FCC Rcd 18893 (1999).

6. Based on the record before us, we find that the public interest would be served by allotting an FM channel to Saranac Lake since an interest has been expressed in providing the community with an additional local aural service and by the substitution of Class A channels at Westport since it could enable Station WCLX to increase its facilities and provide service to a greater population. Further, the staff has confirmed that both Channel 227A and Channel 296A can be allotted to Saranac Lake, as proposed by WB, in lieu of the proposed Channel 276A, thus enabling Channel 275A to be substituted for Channel 273A at Westport.

7. We will not allot Channel 248A to Westport as requested by Family and supported by WB. WB recognizes that the allotment of Channel 248A conflicts with the proposed allotment of Channel 248A at Bristol, Vermont.⁵ However, it argues that since Channel 248A was proposed for use at Westport prior to the filing of the Bristol petition, and the Bristol proposal was not timely filed as a counterproposal herein, Commission policy requires that the Bristol proceeding be dismissed, citing Pinewood, South Carolina ("Pinewood"), 5 FCC Rcd 7609 (1990) (conflicting proposals which are filed too late for inclusion in the on-going proceeding will be dismissed). We disagree with WB. First, the proposed allotment of Channel 248A at Westport was advanced by Family solely to avoid a conflict with a potential future application which it said it might file to upgrade its Waterbury, Vermont, station, not to resolve a mutually exclusive situation presently before the Commission. However, at the time Family filed its proposal, there was no longer a conflict between the Saranac Lake and Westport proposals since WB itself had proposed a resolution as part of its counterproposal. Further, it is well-settled policy that proposals not before the Commission at the time the allotment proceeding is on-going are considered to be speculative at best and therefore not given consideration. See Hardinsburg, Kentucky, 7 FCC Rcd 1746 (1992) (proposed power increase is speculative since licensee had not filed application). Second, WB states that it would prefer to have Channel 248A instead of Channel 275A allotted to Westport because it can be used at Station WCLX's present transmitter site. However, a staff engineering study has found that Channel 248A could not have been then, and still cannot be, allotted to Westport in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules. Rather, Channel 248A at Station WCLX's present transmitter site and construction permit site is short-spaced to Station WFRY-FM, Channel 248C1, Watertown, New York. Therefore, we would not consider the allotment of Channel 248A at Westport unless WB stated its intention to apply for the channel at a site which complied with the Commission's spacing requirements. The Commission will not consider the allotment of short-spaced channels, with limited exceptions.⁶ See, Chester and Wedgefield, South Carolina, recon. den., 4 FCC Rcd 4503 (1989), app. for rev. den., 5 FCC Rcd 5572 (1990), Chester County Broadcasting Co. v. FCC, 1991 WL 101507

to construct and operate the proposed facility will henceforth be considered a material misrepresentation.

⁵ See, MM Docket No. 99-260, 14 FCC Rcd 11637 (1999), Report and Order, adopted concurrently with this proceeding.

⁶ The Commission will consider a grandfathered short-spaced station's request to change its community of license where no change in channel or facilities is proposed. See, e.g., Newnan and Peachtree, Georgia, 7 FCC Rcd 6307 (1992).

(D.C. Cir. 1991). However, even if we were to comparatively consider the substitution of Channel 248A for Channel 273A at Westport and the allotment of Channel 248A at Bristol, the allotment at Bristol would be preferred. A staff engineering study has found that there are no alternate channels available for allotment to Bristol and the allotment would further the Commission's third allotment priority by providing the community with its first local aural service while the Westport substitution would further the fourth priority, other public interest matters.⁷ Additionally, the Commission has previously held that we will favor the allotment of a new service over the enhancement of an existing service, even if it requires the licensee to specify a new transmitter site, where the licensee has originally requested the new channel at a site other than that authorized in its license or permit. See, Boalsburg, Pennsylvania, et al., 6 FCC Rcd 4296 (1991), recon. den. on other grounds, 7 FCC Rcd 7653 (1992), app. for rev. dismissed, 10 FCC Rcd 12264 (1995).

8. Based on the above discussion, we will allot Channel 296A to Saranac Lake, New York, as the community's third local aural service.⁸ We will also substitute Channel 275A for Channel 273A at Westport, New York, and modify Station WCLX's license to specify the alternate Class A channel. Channel 296A can be allotted to Saranac Lake in compliance with the Commission's minimum distance separation requirements, with respect to all domestic allotments, without the imposition of a site restriction.⁹ Channel 275A can be allotted to Westport in compliance with the Commission's minimum distance separation requirements, with respect to all domestic allotments, with a site restriction of 4.6 kilometers (2.9 miles) northeast, to accommodate WB's desired transmitter site.¹⁰ Both Saranac Lake and Westport are located within 320 kilometers (200 miles) of the U.S.-Canadian border and thus Canadian concurrence in the allotments is required. In addition, Channel 296A at Saranac Lake will be short-spaced to Station CITE-FM, Channel 297C1, Montreal, Quebec, Canada, and Channel 275A at Westport will be short-spaced to Station CITE1, Channel 274C1, Sherbrooke, Quebec, Canada. Therefore, concurrence in these allotments, as specially-negotiated short-spaced allotments, was requested in October, 1999, but has not yet been received. However, rather than delay any further the opportunity to file applications for these channels, we will allot Channel 296A at Saranac Lake and Channel 275A at Westport at this time. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Canadian Government, the construction permit will include the following condition: "Operation with the facilities specified herein is subject to modification, suspension, or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Canada-United States FM Broadcast Agreement."

⁷ The Commission's allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local aural service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

⁸ The Commission also has before it the proposed substitution of Channel 227A for Channel 269A at Saranac Lake to accommodate the allotment of Channel 268C2 at Canton, New York. See, MM Docket 99-293, 14 FCC Rcd 16073 (1999).

⁹ The coordinates for Channel 296A at Saranac Lake are 44-19-48 NL; 74-08-00 WL.

¹⁰ The coordinates for Channel 275A at Westport are 44-13-16 NL; 73-24-42 WL.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective June 12, 2000, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Saranac Lake, New York	269A, 292C3, 296A
Westport, New York	275A

10. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Westport Broadcasting for Station WCLX, Westport, New York, IS MODIFIED to specify operation on Channel 275A, in lieu of Channel 273A, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. A filing window for Channel 296A at Saranac Lake, New York, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Chief, Allocations Branch
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